



U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON
COMPETITION POLICY, ANTITRUST, AND CONSUMER RIGHTS

Antitrust Applied: Hospital Consolidation Concerns and Solutions

*May 19, 2021, 2:30PM
Hybrid In-person/Remote Hearing
226 Dirksen Senate Office Building*

PURPOSE

The purpose of this hearing is for the Subcommittee to gain a better understanding of the causes and effects of hospital consolidation, and to consider potential policy changes to increase competition.

KEY TAKEAWAYS

- Witness testimony largely focused on negative aspects of hospital consolidation, suggesting that consolidation leads to higher health care prices, lower wages for health care workers, and less choice for patients. This testimony also generally attributed hospital consolidation to government policies that encourage providers to consolidate, such as health care anti-abuse laws, Medicare payment rules, licensing, and certificate of need laws.
- However, there was discussion on how integrated health systems were able to leverage their scale to respond effectively to the pandemic.
- Several Senators focused particularly on the consequences that health care consolidation may have in rural communities.
- Senator Blumenthal (D-CT) raised concerns about the role of private equity ownership in driving hospital consolidation and increases in health care prices.
- Chairwoman Klobuchar indicated that the Department of Justice and the Federal Trade Commission should consider revising old guidance regarding their antitrust enforcement practices, and asked witnesses what criteria any potential updated guidance should include.

MEMBERS PRESENT

Chairwoman Klobuchar (D-MN)

Ranking Member Lee (R-UT)

Senators Grassley (Ranking Member of the Full Committee), **Blumenthal, Hawley, and Blackburn** (Subcommittee Members)

Absent Members: **Senators Leahy, Booker, Ossoff, Cotton, and Tillis**

WITNESSES

Professor Martin S. Gaynor

E.J. Barone University Professor of
Economics and Public Policy
Carnegie Mellon University

Ms. Beth McCracken

Patient Advocate

Dr. Rodney Hochman, M.D.

President/CEO of Providence St.
Joseph Health; Chair, American
Hospital Association

Mr. Michael Cannon

Director of Health Policy Studies
Cato Institute

Mr. Ahmer Qadeer

Director of Strategic Initiatives
Service Employees International Union

Dr. Brian Miller, M.D.

Assistant Professor of Medicine
John Hopkins School of Medicine

OPENING STATEMENTS

Chairwoman Klobuchar (D-MN) stated that all Americans deserve access to quality, affordable healthcare. We cannot address the challenges of health care costs without including hospitals in the conversation. Mergers can reduce choices for patients. We need to talk about consolidation and market power. [Recounted the story of Witness Beth McCracken, a cancer patient who lost access to her doctor as the result of a merger.] We know there can be advantages to hospital mergers, such as reduced overhead costs, but studies also show that mergers can lead to higher prices. Hospital mergers can also reduce innovation. Health systems are major employers, and we must also consider the effects of health care mergers on health care workers. There is a vicious cycle of consolidation: as insurers merge to gain a bargaining advantage, hospitals feel that they need to consolidate to respond. We need reform antitrust laws. When mergers are anti-competitive, they need to be stopped. We need give our agencies the tools to do that.

Ranking Member Lee (R-UT) said there are different views on how mergers play out. Many studies have shown increases in prices after mergers. The same dynamic plays out when a hospital buys a physician group. We often simply see price increases. It is crucial that policymakers understand how to improve competition. Antitrust enforcement is only a remedial tool. The largest drivers of consolidation often come from government intervention. Medicare reimbursement can incentivize physician practices to merge. Anti-

abuse laws can also incentivize mergers. The Affordable Care Act (ACA) effectively banned physician-owned hospitals. Things are not necessarily better at state level. Certificate of Need laws can prevent new hospitals from entering the market or prevent hospital expansion. The theme here is perverse and disheartening: government intervention produces consolidation, and then the government punishes the consolidation. This is bad for hospitals and for consumers. We can't ignore these problems; I hope today's testimony helps shed light on how we can enhance competition.

TESTIMONY

Prof. Gaynor said our health care system is based on markets and works only as well as these markets. Prices are high and rising. Lack of competition has a lot to do with these problems. There have been 1,600 mergers in the last 20 years. This has not given us enhanced efficiency or better quality. Mergers also harm competition in labor markets, which can depress wages. There are also concerns about anti-competitive practices; health systems can also engage in data blocking. All of this has caused serious harm to patients. Congress should work to end policies that incentivize consolidation, should strengthen antitrust enforcement, should give the Department of Justice (DOJ) and the Federal Trade Commission (FTC) more resources, should permit the FTC to enforce antitrust against non-profits, and should require reporting so that agencies can track merger behavior. We should also refresh and revise guidelines and establish a national health care data base on spending, prices, and ownership.

Ms. McCracken recounted the consolidation of hospitals in Pittsburgh into two major health systems. She recounted her experience as a cancer patient facing access to care limitations based on her insurer's network [she was only able to see ENTs in her network; she was misdiagnosed initially; when she was finally diagnosed with cancer in her ear, her condition had progressed to a point beyond the expertise of the surgeon available to her; and, as a result, she lost her ear.] Denial of access to proper care can mean life or death.

Mr. Cannon stated the health care system is not serving consumers as it should. Inefficient provider consolidation contributes to problems, and is a symptom of government intervention. Government needs to stop encouraging consolidation. Three categories of intervention contribute to consolidation: regulations; encouraging excessive insurance; and directly paying for care. Many regulations encourage consolidation. Various policies also create a situation where people must have more insurance coverage than they otherwise would purchase. Encouraging consumers to purchase more insurance coverage encourages higher prices. Government purchasing of medical care results in pricing errors. Medicare sets the prices it will pay; Medicare inevitably gets those prices wrong. Medicare overpays in many categories, and can encourage consolidation. The government needs to stop encouraging inefficient consolidation. States can do so by repealing Certificate of Need laws and by

overhauling clinician licensing laws. The Federal government should repeal network adequacy laws and price controls found in Medical Advantage and in the ACA. The government needs to put the consumer in charge; the consumer will be more cost conscious and will impose greater price discipline than when the government encourages excess levels of health insurance.

Dr. Hochman said health systems have cared for millions of patients during COVID-19; health care workers are heroes. Our scale enabled us to learn best practices and to scale up telehealth. We were able to manage our personal protective equipment (PPE). Integrated systems used their scale to purchase PPE to keep staff safe and to prepare for a surge in COVID-19 patients; they have also made mass vaccination efforts a success. This would not have been possible without their scale and integration. Integration is key to strengthening health care and to make sure people have access to evidence-based care. Integration has been critical in ensuring access to care for rural populations. Without integration, rural hospitals would have had to close their doors. Integration decreases overhead costs and improves quality. Hospital transactions are not all about gaining market share. The costs that consumers pay are driven by the premiums from insurance companies that face little competition. The insurance market is highly concentrated and insurers do not pass money on to providers or consumers.

Mr. Qadeer said consolidation has been continuing, especially in the largest systems. Big firms are getting bigger. There is evidence that consolidation leads to lower wages. Simply put, as employer concentration rises, wages fall. Research on employer concentration in health care follows these patterns. Workers in concentrated work environments also face additional problems: wage theft; more health and safety code infractions; and other contraventions of labor laws. Excessive employer concentration decreases workers' quality of life. Much more can be done to promote fair and competitive labor markets: all merger reviews should include an analysis of labor market impact; there should be bright line rules for anti-competitive practices; and we should prohibit anti-competitive labor restraints, such as non-competition clauses. Health care workers have kept us alive during COVID-19. They deserve living wages and healthy workplaces.

Dr. Miller said there has been one harm that has not yet been stated: the loss of innovation as a result of lack of competition. This is illustrated through low labor productivity growth in the hospital industry. I agree with Mr. Cannon that facility-dependent payment systems drive consolidation. The Centers for Medicare and Medicaid Services (CMS) attempted to fix the problem, but it was sued by industry and lost in court. Congress can provide clear statutory authority to fix the consolidation incentive. The Stark Law can also be reformed to reduce consolidation; and Congress can review fraud and abuse laws that are anti-competitive. Finally, physician-owned hospitals can encourage market entry. Rigid government interventions distort markets and encourage consolidation. The government should not favor one market participant over others. Changing antitrust statutes is the wrong tool.

QUESTIONS AND ANSWERS

Chairwoman Klobuchar (D-MN) asked whether increasing enforcement resources would help improve enforcement against anti-competitive hospital mergers. **Prof. Gaynor** said that agency budgets have been flat while mergers have skyrocketed. Agencies need more resources to keep up with issues. **Chairwoman Klobuchar** asked whether FTC resources would help. **Dr. Miller** said that additional funding and staff would help. **Chairwoman Klobuchar** asked how Ms. McCracken's experience should have gone. **Ms. McCracken** stated, I should have been able to see who my doctor thought was the best provider for me to see. It was two floors down in the same building. **Chairwoman Klobuchar** asked how consolidation can affect rural communities. **Prof. Gaynor** stated that rural communities are vulnerable; they have to travel a long way to the nearest alternative. Services can be eliminated or reduced when there are consolidations. **Chairwoman Klobuchar** asked what happens when there are restrictions that prevent insurers from designing plans that reduce costs. **Prof. Gaynor** said that competition on price occurs via insurers and hospitals negotiating. Those negotiations drive prices and create the network. If dominant hospitals impose restrictions, this can be very damaging. **Chairwoman Klobuchar** asked if antitrust enforcers are doing enough, and if greater resources would help. **Mr. Qadeer** said there is a real gap in enforcement in product cases and labor cases. There is not enough enforcement in labor markets. More resources could help. The things that need to happen are: merger reviews should analyze labor markets; clear standards for anti-competitive practices; and ending restrictions that employers can place on employees.

Ranking Member Lee (R-UT) asked, what reforms would you recommend in state licensing? **Mr. Cannon** said that occupational licensing occurs at the state level, so the Federal government would not have power to reform unless the Commerce Clause is implicated. Congress could redefine the locus of the practice of medicine (POM) from the patient's location to the provider location. This would tear down interstate telemedicine barriers. Physicians could then see patients across the country. **Ranking Member Lee** asked: most states define POM depending on where the patient is located? **Mr. Cannon** said, yes, [and recounted some telehealth changes and waivers due to COVID-19]. We have advocated for eliminating physician licensing altogether; they block access to care by raising prices and blocking competition. Most quality and patient protections do not come from licensing, they come from credentialing, malpractice, etc. **Ranking Member Lee** asked, can you describe how choice and competition impact patients? **Dr. Miller** said that many processes have not changed since 1973; innovation has not occurred due to consolidation.

Sen. Blumenthal (D-CT) said that private equity (PE) deals in health care have nearly tripled in the past decade with \$750 billion going into hospital deals in the last three years alone. Those deals mean that PE funds are not on the hook for loans; the providers are responsible for repaying the debt. This structure has profound consequences. Large hospital chains under PE management have had to sell hospitals to meet their debt burden. How does hospital debt play a role in consolidation? **Prof.**

Gaynor stated that there is real concern about the role of PE. The model is to take over an underperforming hospital and then sell it for a profit. We do not know at this point what role PE has played in consolidation. We need to know more about that. We need to know more about the behavior of PE firms. If the market is less competitive, PE will take every advantage for profit opportunities. It is an important issue. **Sen. Blumenthal** said the PE model generates short-term profits and long-term consequences for patients [described a PE practice of selling hospital real estate, and requiring the hospital to then lease its previous facilities.] These PE acts in health care have gone unchecked and unstudied for too long.

Sen. Hawley (R-MO) asked whether PE-backed mergers have an impact on patient access, outcomes, and the viability of hospitals. **Prof. Gaynor** said that we need to know a lot more. There are reasons to be concerned based on the business model. We need more evidence. **Sen. Hawley** said, I am concerned that PE is helping drive consolidation and is harmful for rural communities. What are your thoughts on hospital mergers in rural markets? **Prof. Gaynor** said that, if workers in rural areas have few alternatives, they would have to travel, and employers have more market power. If the hospital is one of the biggest employers in town, wages start getting pushed down. Working conditions change. If the next available employment is hours away, workers do not have a lot of options. This gives the employer a lot of power. This affects the entire economy. **Sen. Hawley** asked, does it affect retention rates? They may leave the industry altogether? **Prof. Gaynor** said yes, it can cause people to leave the geographic region. At some point people will leave that area and migrate elsewhere. That has ripple effects on that location. **Sen. Hawley** asked, what is the effect on access to care? **Prof. Gaynor** said, I don't know of evidence that shows these effects, but deductively, this could start a vicious cycle. There is a real potential for that. **Sen. Hawley** asked, how have rising health care costs impacted wage growth? **Prof. Gaynor** said that merged systems can raise prices, insurers raise premiums for employers, and employers pass that cost on to employees. It cycles all the way around from higher hospital prices to wallets of workers. Health care costs are being paid in large part by workers.

Sen. Grassley (R-IA) asked whether costs increase or decrease when hospitals merge [citing that Prof. Gaynor noted that they increase, but that Dr. Hochman indicated they can decrease]. **Prof. Gaynor** said, I meant cost to the consumer. When close hospital competitors merge, prices go up, in some cases up to 65%. That comes out of workers' pockets, sometimes dollar by dollar. Some studies show that there can be reductions in the hospital's costs, but not when they are close competitors. The studies that Dr. Hochman cited were paid for by the American Hospital Association and were not subject to any scientific review. They are not consistent with the scientific evidence. **Dr. Hochman** said that rural hospitals have been struggling. They are in difficult financial situations. We have a scarcity of labor. **Sen. Grassley (R-IA)** asked, how widespread are debt collection practices by non-profit hospitals? **Dr. Hochman** said, we have new standards around billing and collections, getting rid of all of those egregious practices [debt collection practices cited by Sen. Grassley]. The AHA is strongly looking at this

issue, and we can share with you our guidelines. **Dr. Hochman** [continuing previous response] said, we found a scarcity of labor. We were struggling to get enough nurses. Staffing companies were raising prices for traveling nurses. We have seen increases in labor costs which went to wages and better benefits. From the frontline, we just do not see what Prof. Gaynor has cited on the labor side. **Mr. Qadeer** said that there is a scarcity of health care workers. The findings are still robust. Hospital mergers create a depression in wages. Wages do not rise as much in labor markets where hospitals are consolidated.

Ranking Member Lee asked, why not allow physicians to compete against hospitals? **Dr. Miller** said, we should be doing that. The answer is more competition. **Ranking Member Lee** asked, Mr. Cannon, you described how Federal tax policy influences the type of insurance people have. How does this affect competition? **Mr. Cannon** said that the tax preference for employer-sponsored insurance encourages employers to purchase, for their employees, more comprehensive insurance than employees would purchase on their own. There are also laws that require consumers to purchase insurance that they don't want. The effect is that consumers are more heavily-insured, they don't care as much as if their money were on the line. Excessive insurance encourages excessive health care prices. If you reduced excessive insurance, you can reduce prices. It makes patients more cost-conscious. When consumers are made conscious about costs, they ask for price information, which can reduce prices. [Cites hip replacement costs example in California.] The consumers decided to go somewhere less expensive. **Ranking Member Lee** asked, are there policy proposals we can take from that example? **Mr. Cannon** said, you can eliminate excess levels of health insurance that abet excessive prices. You reform tax exclusions for employers. You could have that go to workers in a health savings account to purchase insurance. **Ranking Member Lee** said that allowing the favorable tax treatment to fall to individuals creates competition, lowers prices, and increases quality.

Sen. Blackburn (R-TN) said rural hospitals have faced health care worker shortages, and COVID-19 has exacerbated this. Could you discuss how health care systems have helped rural areas during COVID? **Dr. Hochman** said that rural hospitals needed our help. We helped with telehealth to get specialists out there. We also need to ensure they can get the doctors and professionals they need. People want to get care in the communities where they live. **Sen. Blackburn** asked, what options would rural people have if their local hospital is at risk of closing and there is not a larger group that they can join? **Dr. Hochman** said, we think some public-private funding opportunities could be available. Mental health problems are paramount in those areas, and we really need to find different funding options, care, and telehealth. And to figure out how they can affiliate with larger health systems. **Sen. Blackburn** said that out-of-pocket costs have continued to increase. How has government intervention, like, the ACA, affected costs and access to care? **Mr. Cannon** said that insurance increases prices. To the extent the ACA expanded coverage, it made patients less cost-conscious. Patients are more insulated from the cost of their care.

Chairwoman Klobuchar said that, in 1996, the DOJ issued guidelines about their approach to reviewing mergers. Should the agency issue new guidelines on hospital antitrust enforcement, and what should those guidelines include? **Prof. Gaynor** said that it would be a worthwhile investment for FTC and DOJ to revise guidelines to capture what we know about horizontal mergers on the efficiencies side and on the harms side. They should make a clear signal to market participants. They should also consider vertical integration. Hospital acquisition of physician groups is very different than what it was in 1996. Anti-competitive conduct is a more prominent issue now as well. Courts have a very hard time with health care antitrust. Guidelines could also help courts. **Dr. Hochman** said that there are many deals that do not go through because they should not go through. The enforcement process is not inadequate [cites rigorous review processes in California], but we can make it better. There is a rigorous process that exists at the FTC level and at the Attorney General level. I can tell you, consolidated systems have saved lives during COVID. Doctors work together; the quality gets better. The quality has gotten better when doctors work together. We care most about the patients, and serving the communities that we are in.

[The Subcommittee adjourns.]